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In the

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 332

LEON JOHNSON, alias ROBERT McMILLAN,
Respondent,

v.

CHARLES L. DYE, Warden of the Allegheny
County Jail, Petitioner

AMICUS CURIAE BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The State of Georgia, a sovereign State of the United States of America, files this brief in support of the petition for the writ of certiorari to the United States Court of Appeals for the Third Circuit, filed in this court by Charles L. Dye, Warden of the Allegheny County, Pennsylvania, jail.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is printed as Leon Johnson, alias Robert McMillan, Appellant, v. Charles L. Dye, Warden of the Allegheny County Jail, in 175 Fed. (2d), 250. The opinion of the District Court of the United States for the Western Dis-

trict of Pennsylvania is printed as Johnson v. Dye, in 71 Fed. Supp., 262.

STATEMENT OF JURISDICTION

The State of Georgia adopts the statement of jurisdiction as made in the brief for petitioner.

INTEREST OF THE AMICUS CURIAE

1. The respondent was convicted of murder and escaped from a Georgia prison, and his return was and is sought by the State of Georgia.

2. The legal position of the State of Georgia differs from that of the petitioner upon the question of the application of the doctrine of exhaustion of state remedies in habeas corpus cases arising from extradition proceedings.

3. The legal position of the State of Georgia differs from that of the petitioner upon the question of the application of the 8th and 14th Amendments to the United States Constitution to the facts of this case.

4. The State of Georgia, though not a party to this action, has been subjected to unseemly comment of a derogatory nature not in keeping with the respect due a sovereign state under the federal system. It files this brief to support such action as will provide it opportunity to negative charges made by the escapee and sanctioned by the Court of Appeals.

STATEMENT OF THE CASE

The petitioner has stated the matter involved as follows:

Leon Johnson was indicted in Cobb County, Georgia, for the murder of his paramour, Sarah Frances Thompson. He was found guilty with a recommendation of mercy on January 25, 1943, which recommendation under Georgia law, fixed the penalty at life imprisonment.

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Six months later, in June of 1943, Johnson escaped and eventually came to Allegheny County, Pennsylvania, where he was apprehended. The Governor of Georgia issued a request to the Governor of Pennsylvania, who issued an executive warrant under which Johnson was arrested. Johnson sued out a writ of habeas corpus in Allegheny County, by which he charged:

1. He was improperly convicted in Georgia;

2. That the witnesses for the State of Georgia testified falsely because of intimidation;

3. That while he was in prison, he received brutal treatment from the prison guards and that his life will be endangered if he were returned to Georgia.

The Common Pleas Court of Allegheny County heard all of the evidence of the petitioner and his witnesses together with the evidence of the Chief of Police of Cobb County, Georgia, who testified that prisoners were not ill-treated; that no prisoner had died of violence or neglect; and that the Georgia "chain gang" was abolished three years prior to the petitioner's sentence. The Common Pleas Court of Allegheny County was not convinced of the truth of Johnson's averment and dismissed the writ.

An Appeal was taken to the Superior Court of Pennsylvania which sustained the lower court (Commonwealth ex rel. Johnson v. Dye—159 Pennsylvania Superior Court 542) and concluded, after an exhaustive review of the Georgia conviction, that he was convicted properly and that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

Although appeals from the Superior Court of Pennsylvania are heard in the Supreme Court of Pennsylvania, no petition for such an appeal was filed but, instead, Johnson filed a new petition for a writ of habeas corpus in the District Court of the United States for the Western District of Pennsylvania,

alleging that he was improperly found guilty of murder in Cobb County, Georgia, and that following his conviction, he was committed to a chain gang and was a victim of cruel, barbaric and inhuman treatment, which jeopardized his life and that if he is returned to Georgia, he will meet his death by mob violence or tortured to death by his jailors. Testimony was taken from the relator and other witnesses confined in the Allegheny County Jail at that time, all of whom except one were escaped prisoners from Georgia, but no testimony was introduced by the Commonwealth of Pennsylvania on behalf of the State of Georgia. After hearing petitioner and his witnesses, petition for a writ of habeas corpus was discharged, following which, an appeal was taken to the United States Court of Appeals for the Third Circuit which reversed the District Court and found that Johnson suffered cruel and unusual punishment at the hands of the employees of the prison system of Georgia and that such action on the part of the employees was the action also of the State of Georgia which, in turn, was a violation of the 8th Amendment of the United States Constitution as implemented by the 14th Amendment, and discharged the prisoner.

A petition for stay of mandate was presented by the Commonwealth of Pennsylvania, pending a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, which, on May 27, 1949, ordered the mandate stayed.

Subsequently the District Attorney of Allegheny County filed a motion for leave to file a petition for rehearing out of time. A similar motion was filed by the Attorney General of Pennsylvania. A motion for leave to intervene was filed by the State of Georgia, alleging lack of notice of the proceedings, particularly, lack of notice of an invitation by the Circuit Court to appear and argue Amicus Curiae.

All motions were denied.

ISSUES INVOLVED

The questions presented by the petition, together with pe-

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titioner's reasons for the granting of the writ of certiorari, may be summarized as follows:

1. Does the doctrine which requires exhaustion of state remedies as a prerequisite to the entertainment of application for habeas corpus by federal courts apply to such applications arising from extradition proceedings?

2. Is the 8th Amendment of the United States Constitution so implemented by the 14th Amendment as to become a limitation upon state action?

3. Are the findings of fact made by the Court of Appeals properly made, and are they supported by the evidence in the record?

4. Are the criminal acts of the employees of a state prison properly attributable to the state as its official acts?

ARGUMENT AND CITATION OF AUTHORITY

The Federal Courts should not have entertained the petition for the writ of habeas corpus because the prisoner has not exhausted the State remedies.

The decision of this Court in the case of

Ex Parte Hawk, 321 U. S. 114,

and the subsequent codification of the rule therein (Title 28, U. S. C. A., Sec. 2254), flatly state that an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state.

The Court of Appeals has attempted to engraft upon this rule an exception in the case of habeas corpus proceedings brought to prevent extradition. No such exception is indicated in the decisions of this court nor in their codification; instead, both are strongly to the contrary.

Further, the United States Court of Appeals for the First Circuit has decided a similar case with an opinion in direct conflict with the opinion of the Circuit Court for the Third Circuit in this case.

Lyon v. Harkness, 151 F. (2d) 731.

To permit such an exception would violate the very purpose and basis of the decision in *Ex Parte Hawk* and its codification in Section 2254. It would once again permit prisoners detained by virtue of the judgments of state courts to flood the federal judicial system with applications for habeas corpus, as was formerly done. See,

Parker, "Limiting the Abuse of Habeas Corpus,"
8 Fed. Rules Decisions, 171.

The only additional requirement being the extremely illogical one that the remedy would be available only to *escaped* prisoners; those properly confined being still required to exhaust state remedies as a prerequisite to obtaining a hearing in the federal courts.

It should be noted that the opinion of the Court of Appeals does not predicate the entertainment of the writ upon the absence of available state corrective processes or the existence of circumstances rendering such processes ineffective to protect the rights of the prisoner; instead, the Court simply extends the rule without explanation and without the citation of any authority.

Petitioner, in its brief supporting its petition for the writ of certiorari, maintains that the federal courts should not have entertained the application for the writ of habeas corpus because the prisoner has not exhausted the remedies provided him by the judicial system of the State of Pennsylvania.

The State of Georgia agrees that the federal court should not have entertained the application for the writ, but for a different reason, viz: the scope of inquiry in an application for habeas corpus arising out of extradition proceedings is stringently limited to the following questions:

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1. Whether the person demanded has been substantially charged with a crime, and
2. Whether he is a fugitive from justice of the demanding state.

Roberts v. Reilly, 116 U. S. 80
Whitten v. Tomlinson, 160 U. S. 231
Munsey v. Clough, 196 U. S. 364
Illinois ex rel McNichols v. Pease, 207 U. S. 100
Drew v. Thaw, 235 U. S. 432
Biddinger v. Commissioner of Police, 245 U. S. 128
In re Strauss, 126 F. 327,

and does not include the right to test the legality of the original state court judgment or the methods of its execution. The State of Georgia maintains that the prisoner should have been extradited to Georgia and that there he must exhaust the corrective processes provided by the State of Georgia before the federal courts may properly entertain the application for writ of habeas corpus.

Admittedly, the federal courts may properly entertain an application for habeas corpus where there is an absence of available state corrective processes. But nowhere has it been contended that the State of Georgia does not provide adequate corrective processes for the redress of such wrongs as the prisoner here claimed.

The Constitution of the State of Georgia of 1877, and the Constitution of the State of Georgia of 1945, prohibit cruel and unusual punishments, and provide that the writ of habeas corpus shall not be suspended.

Constitution of the State of Georgia,
Art. 1, Sec. 1, Pars. 9 and 11.

The Constitutional provision providing for habeas corpus has been implemented by statute.

Georgia Code Anno., Title 50, Section 101.

The federal courts also may entertain such writs when

there exist circumstances rendering state processes ineffective to protect the rights of the prisoner. The opinion of the Court of Appeals was not predicated upon any such circumstance.

It may safely be predicted that other escapees will attempt to gain release by making similar charges without having exhausted the remedies provided by either the demanding or the asylum state as a result of the rule laid down in the instant case. This circumstance, following so closely upon the decision in *Ex Parte Hawk* and its codification, would seem to present a question demanding clarification.

Application of the 8th and 14th Amendments.

Petitioner in his brief relies on the proposition that the 8th Amendment to the United States Constitution is not a limitation upon state action, and that its provisions and prohibitions are not implemented by the 14th Amendment.

The State of Georgia does not rely upon this proposition. The right of a prisoner to be secure from invasion of his personal liberty and safety is surely such a basic and fundamental right as to be protected under any concept of ordered liberty. Georgia has provided such protection.

The Evidence does not support the Findings of Fact.

Petitioner in his brief has questioned the findings of fact made by the Court of Appeals. These findings are founded upon the following bases:

1. The testimony of the prisoner, Johnson, and that of other prisoners.

2. The following statement made by the District Court Judge:

   "There is evidence that Johnson received cruel treatment after he had been convicted of murder and after he was serving his sentence therefor."

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3. The Court's statement as follows:

"Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence . . ." (R. 37)

4. ". . . the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses." (R. 37)

5. The contents of articles published in various magazines. These bases are worthy of separate consideration.

1. The testimony of the prisoner, Johnson, and that of other prisoners.

It should be noted that Johnson had appeared and testified in the Common Pleas Court of Allegheny County, Pennsylvania, and was apparently disbelieved.

On appeal to the Circuit Court of Pennsylvania (Commonwealth Ex Rel Johnson v. Dye, 159 Pa. Superior Court, 542), the Superior Court was upheld and the Supreme Court stated that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

The fact that Johnson was tried and convicted of murder and sentenced to life imprisonment by the courts of Georgia cannot be overlooked in evaluating his credibility.

It cannot be fairly said that the District Court found Johnson's testimony either credible or incredible because the District Court held that the subject of his testimony, his treatment, was not a proper subject for inquiry.

All the other witnesses who testified, except one, were escaped convicts from Georgia who happened to be lodged in the Allegheny County jail. The remaining witness, also a prisoner in the Allegheny County jail, had previously es-

caped from detention in Pittsburgh following his arrest for an alleged felonious assault. Certainly, the circumstances in which these witnesses were found raises a substantial question as to their credibility.

2. The following statement made by the District Court Judge:

> "There is evidence that Johnson received cruel treatment after he had been convicted of murder and after he was serving his sentence therefor." (R. 34)

The above statement of the District Court was treated as follows by the Circuit Court:

> "We deem . . . (the statement) . . . to constitute a finding by the court below that Johnson had been subjected to cruel treatment following his conviction." (R. 34)

When the statement of the District Court and the Circuit Court are juxtaposed, the extreme tenuousness of the Circuit Court's finding is clearly revealed. Such a finding is completely unsupported by the opinion of the District Court. The mere introduction of evidence of a fact in a trial court, and a statement by the trial court acknowledging the introduction of such evidence, cannot be considered a finding that such evidence was credible, accurate or conclusive.

3. The Court's statement as follows:

> "Indeed no other conclusion would be possible in view of the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence . . ." (R. 37)

It is respectfully submitted that this statement indicates that the Circuit Court based its opinion on matters outside the record.

4. ". . . the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witnesses." (R. 37)

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The State of Georgia was not a party to the proceeding, nominally or actually. Although it is stated in the opinion of the Circuit Court that the State of Georgia had been invited to appear, the State of Georgia denied receipt of such invitation (R. 67). It is not stated by the Circuit Court that the notice given the State of Georgia was, or was intended to be, in compliance with Title 28, U.S.C.A., Sec. 2252.

It is manifestly unfair to base a finding of fact upon the circumstance that a party, not a party to the suit, nominally or actually, failed to appear and introduce testimony to contradict testimony of a convicted murderer who has several times been judicially declared to be "an untrustworthy witness."

This inequity is compounded when the absent party is a sovereign state and, as such, due to be considered by every court worthy of the highest respect. Regardless of the opinion held by the Circuit Court of the judicial and penal processes of the State of Georgia, the Circuit Court's finding is not supportable by the *absence* of the State of Georgia or by the fact that Georgia introduced no evidence.

The use of this circumstance as a basis for the opinion, and indeed the opinion itself, has the effect of placing a legal obligation upon every state to make an appearance in every proceeding where the state's attempt to extradite escaped prisoners is challenged by the prisoner. The expense, the administrative difficulty, and the indignity incident to such a requirement would be reason enough for rejecting a rule having such an effect were the question a novel one, but it is not. The limitations upon the scope of the inquiry in habeas corpus applications resisting extradition were established to prevent just such difficulties, as well as to prevent the unseemly spectacle of the lower federal courts reversing the findings of state judicial systems. To require that a state try out such cases wherever an escaped prisoner may flee is to place an unreasonable burden on the states.

5. The contents of articles published in various magazines.

The Circuit Court did not rule upon the admissibility of such periodicals, but stated that, since some of the witnesses employed the periodicals as bases of comparison, the Circuit Court considered the contents of the articles. (R. 33)

If the articles referred to were used merely as a basis for comparison, they do not, of course, have of themselves any evidentiary value beyond that of the witness making the comparison. See sub-paragraph 1 above.

The Criminal Acts of State Prison Employees are not the Acts of a State.

The Court of Appeals found that the employees of the State of Georgia had been guilty of inflicting cruel and unusual punishment upon the prisoner. The Court stated:

> ". . . and it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the State of Georgia. The fact that a state officer acts illegally cannot relieve a state of responsibility for his acts. Screws v. U. S., 325 U. S. 91." (R. 36)

Admittedly, the *Screws* case held that a state agent could not avoid prosecution based upon acts criminal only if committed in an official capacity, by maintaining that such acts were committed in an individual rather than official capacity. It is quite another matter to hold that the criminal acts of a state employee are the acts of the state itself so as to impute criminality to the state. The decision of the Court of Appeals, in effect, finds the State of Georgia guilty of criminal conduct. It is unthinkable that any federal court should formally make such an adjudication. The federal system is fundamentally based upon mutual respect for the dignity of the sovereigns.

It is well possible that an employee of any state or of the federal government may be guilty of criminally mistreating prisoners. In such cases, state court remedies are available.

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As this Court said, in

Wade v. Mayo, 332 U. S. 672,

"State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty."

Also see,

Marbles v. Creecy, 215 U. S. 63
Drew v. Thaw, 235 U. S. 432

The opinion of the Court of Appeals, in effect, holds that the remedy available at the hands of the judicial system of Georgia is worthless. Thus the Court of Appeals not only holds that the penal system of Georgia permits the perpetration of crimes upon its prisoners; it holds, in effect, that the judiciary of Georgia provide no relief for such crimes.

If state court remedies are not available, or are not effective, the federal courts are open.

There is no suggestion in the instant case that the prisoner was or will be denied access to the Georgia courts or to the federal courts in Georgia for redress.

The State of Georgia respectfully submits that the decision of the Court of Appeals is derogatory to the State in its sovereign capacity, and should not be allowed to stand.

In addition to what is said herein, the State of Georgia adopts the argument and citations contained in brief filed by the petitioner, with the exceptions herein noted, and adds its request that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Title 28, *United States Code, Section* 2252:

"Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

Title 28, *United States Code, Section* 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Constitution of the State of Georgia of 1877 *and Constitution of the State of Georgia of* 1945, *Art.* 1, *Sec.* 1, *Pars.* 9 *and* 11.

" *Paragraph IX. Bail; fines; punishment; arrest, abuse of prisoners.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison."

"*Paragraph XI. Habeas corpus.* The writ of Habeas Corpus shall not be suspended."

Georgia Code Ann., Title 50, *Sec.* 50-101.

"Any person restrained of his liberty under any pretext

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whatever, or any person alleging that another, in whom for any cause he is interested, is restrained of his liberty or kept illegally from the custody of the applicant, may sue out a writ of habeas corpus to inquire into the legality of such restraint."